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In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO

ON MOTION FOR LEAVE TO FILE A COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, Texas's motion for leave to file a complaint should be granted, and New Mexico should be invited to file a motion to dismiss.

STATEMENT

The State of Texas seeks leave to file a complaint to enforce its rights under the Rio Grande Compact (Compact). See Act of May 31, 1939, ch. 155, 53 Stat. 785; Compl. App. 1-20. The Compact apportions the water of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. Under the Compact, Colorado is required to deliver a specified quantity of water to the New Mexico state line. New Mexico is then required to deliver a specified quantity of water to Elephant Butte Reservoir, a federal Bureau

of Reclamation (Reclamation) project that was authorized, constructed, and had been distributing water pursuant to contracts with irrigation districts in southern New Mexico and western Texas before the States entered into the Compact. Elephant Butte is approximately 105 miles north of the Texas state line.

Texas complains that New Mexico has depleted Texas's equitable apportionment under the Compact by allowing diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande below Elephant Butte, thereby diminishing the amount of water that flows into Texas. New Mexico contends that the Compact does not require it to deliver any specific amount of water to the Texas state line, and that Texas therefore fails to allege a violation of the Compact.

A. The Rio Grande Basin

The Rio Grande rises in Colorado, flows south into New Mexico, then flows into Texas near El Paso. After crossing the New Mexico-Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville. Pl. Br. 5-6 & n.2; Pl. Br. App. A1 (map).

The Compact defines the Rio Grande Basin as "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman." Art. I(c), 53 Stat. 785. Fort Quitman is located about 80 miles southeast of El Paso. The Basin is about 700 miles long and has a drainage area of approximately 34,000 square miles. National Resources Committee, Regional Planning, Part VI—The Rio Grande Joint Investigation in the

Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937, at 7 (1938) (Joint Investigation).

B. The Rio Grande Project

1. In the 1890s, regular water shortages along the lower Rio Grande prompted the Mexican government to press claims against the United States, alleging that shortages were due to increased diversions upstream. Joint Investigation 8, 73. In response, the Department of the Interior began to investigate the potential for storage and irrigation projects in the upper Rio Grande Basin. *Ibid.*

In 1904, at an Irrigation Congress attended by representatives of the New Mexico Territory, Texas, and other western States, Reclamation presented detailed results of an engineering analysis and proposed to build a dam at the current site of Elephant Butte Reservoir. See U.S. Geological Survey, *Third Annual Report of the Reclamation Service 1903-04*, H.R. Doc. No. 28, 58th Cong., 3d Sess. 395-420 (1905). Reclamation further recommended that water from the reservoir be delivered to Texas and New Mexico in amounts proportional to the irrigable lands within each State. *Id.* at 425. Representatives from Texas and New Mexico, as well as a delegation from Mexico, endorsed the project. See Official Proceedings of the Twelfth National Irrigation Congress 107 (Guy E. Mitchell ed., 1905).

2. The Reclamation Act of 1902 provided authorization and funding for irrigation works in various States, including New Mexico. See Act of June 17, 1902, ch. 1093, 32 Stat. 388. In 1905, Congress extended the 1902 Act to "the portion of the State of Texas bordering upon the Rio Grande" that could be irrigated by water from the proposed reservoir at

Elephant Butte. See Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. The Secretary was authorized to proceed with construction of the dam only after determining that there was "sufficient land in New Mexico and in Texas which can be supplied with the stored water" at a price sufficient to reimburse the federal government for the cost of the project. *Ibid.* In 1906 and 1908, the United States filed notices with the Territory of New Mexico of the federal appropriation of and the right to use specified waters of the Rio Grande. Joint Investigation 73.

Construction of the Rio Grande Project (Project) began in 1910. Elephant Butte Reservoir, the largest storage facility, and a canal system and diversion dams, were completed in 1916. Joint Investigation 73. A system of drains was added by 1925, and construction of a second storage facility, Caballo Reservoir, was completed below Elephant Butte Reservoir in 1938. *Id.* at 73, 85.

The Project is designed to deliver more water than it releases from storage. That is because water delivered for irrigation is never completely consumed. Some portion of the initial deliveries seeps into the ground or flows off the agricultural fields into drains. When these "return flows" get back to the river, they can be delivered to Project beneficiaries downstream. Return flows have historically comprised a significant part of the Project's deliveries. See Joint Investigation 47-49, 55, 100; *id.* at 49 ("In estimating the water supply for the major units of the upper basin under given future conditions of irrigation development, the return water is an important consideration.").

3. In 1906, Reclamation entered into contracts with two irrigation districts—the entities now known as

Elephant Butte Irrigation District (EBID) in New Mexico, and the El Paso County Water Improvement District No. 1 (EPCWID) in Texas—for the irrigation of approximately 155,000 acres of land (67,000 acres in Texas, and 88,000 acres in New Mexico). Joint Investigation 83. Those acreages were confirmed in a contract between EBID and EPCWID that was signed on February 16, 1938. App., *infra*, 1a-4a. The contract provides that "in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within [EPCWID], and 88/155 to the lands within [EBID]." *Id.* at 2a. Those proportions are roughly equivalent to 43% for EPCWID in Texas and 57% for EBID in New Mexico. Pursuant to the 1938 contract, which was also signed by the Assistant Secretary of the Interior, *id.* at 4a, Reclamation calculates diversion allocations on the same proportions today. See pp. 18-19, *infra*.

4. In addition to water that the Project delivers to EBID and EPCWID pursuant to contracts, the Project also delivers water to Mexico pursuant to a treaty. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre-feet of water per year delivered from the Project. Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, Art. II, May 21, 1906, U.S.-Mex., 34 Stat. 2954.

C. The Rio Grande Compact

The Project helped to address concerns about water supply in southern New Mexico and western Texas by providing a reliable irrigation system. The Project

did not, however, resolve concerns about development upstream of Elephant Butte that was depleting the water supply to the Project. In 1929, Congress authorized Colorado, New Mexico, and Texas to negotiate an apportionment of the waters of the Rio Grande. Act of Mar. 2, 1929, ch. 520-521, 45 Stat. 1502.

To maintain the status quo on the River pending negotiation of a permanent compact, the States agreed to an interim compact, which Congress approved. Act of June 17, 1930, ch. 506, 46 Stat. 767. Article XII of the interim compact provided that "New Mexico agrees with Texas, with the understanding that prior vested rights above and below Elephant Butte Reservoir shall never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return." 46 Stat. 772.

The parties signed the Rio Grande Compact on March 18, 1938, approximately one month after EPCWID and EBID entered into the contract confirming the acreage in each State that would receive Project water. See p. 5, *supra*. Congress approved the Compact the following year. Act of May 31, 1939, ch. 155, 53 Stat 785. The Compact's preamble states that Colorado, New Mexico, and Texas entered into the Compact "to remove all causes of present and future controversy among these States * * * with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas" and "for the purpose of effecting an equitable apportionment of such waters." Preamble, 53 Stat. 785.

Article III of the Compact requires Colorado to deliver water at the New Mexico state line in an amount determined by schedules that correspond to water quantities at various gauging stations. 53 Stat. 787-788.

Article IV requires New Mexico to deliver water at San Marcial, New Mexico—a gauging station upstream of Elephant Butte—in an amount that is similarly determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission (RGCC), established under Article XII of the Compact, 53 Stat. 791, changed the gauge for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte. Compl. para. 13; N.M. Br. in Opp. 1 n.1.

Article VI of the Compact establishes a mechanism for adjusting the delivery requirements of Colorado and New Mexico from year to year. The Compact compensates New Mexico and Colorado for over-deliveries and penalizes them for under-deliveries through a system of debits and credits. It establishes limits on the total amount of debits and credits that an upstream State may accrue and also requires New Mexico and Colorado each to "retain water in storage [upstream of Elephant Butte] at all times to the extent of its accrued debit." Art. VI, 53 Stat. 789-790.

The combined capacity of Elephant Butte and other reservoirs "below Elephant Butte and above the first diversion to lands of the Rio Grande Project" is referred to in the Compact as "project storage." Art. I(k), 53 Stat. 786. The Compact defines "usable water" as water "in project storage" that is "available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

Article XI of the Compact states that Texas and New Mexico agree that upon the Compact's effective date, "all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled." 53 Stat. 790-791. It further provides that "nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." *Ibid.*

D. The Current Controversy

1. Texas contends that once New Mexico delivers water to Elephant Butte as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. Compl. para. 4. Texas alleges that, contrary to that allocation, New Mexico has "increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground" downstream of Elephant Butte in New Mexico. *Id.* para. 18.

Thus, Texas contends that if New Mexico water users are allowed to intercept surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte in excess of Project allocations, deliveries of water to Project beneficiaries in Texas and to Mexico cannot be assured. Compl. para. 11. Texas further contends that such use has diminished Project return flows and decreased water available to Project beneficiaries, to Texas's detriment. *Id.* paras. 18, 19.

Texas alleges that the surface water and groundwater depletions allowed by New Mexico "have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually." Compl. para. 18. Those extractions, Texas maintains, "create deficits in tributary underground water which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water," which requires additional releases from Elephant Butte and thereby decreases the amount of water stored in the Reservoir for future delivery to Project users. *Ibid.* Texas alleges that New Mexico's actions have resulted in "ongoing, material depletions of flows of the Rio Grande at the New Mexico-Texas state line, causing substantial and irreparable injury to Texas." *Id.* para. 19.[1]

Texas requests declaratory relief, a decree requiring New Mexico to deliver water to Texas in accordance with the Compact, and damages. Compl. pp. 15-16.

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[1] New Mexico does not appear to contest that there have been substantial diversions of surface water and groundwater in New Mexico. Indeed, New Mexico has brought suit in federal district court challenging a 2008 settlement agreement among Reclamation, EBID, and EPCWID (the 2008 Operating Agreement) that effectively requires EBID to account for changes in Project efficiency caused by groundwater pumping in New Mexico. See pp. 18-19, *infra*. In that suit, New Mexico alleges that the use of water by the Project has "drastically changed" since the settlement "in that approximately 150,000 acre-feet less per year has been delivered to New Mexico than was delivered prior to the 2008 Operating Agreement." 1:11-cv-00691 Docket entry No. 45, para. 46 (Feb. 14, 2012); see also pp. 18-19, *infra* (discussing *Supplemental Environmental Assessment* prepared by Reclamation in connection with the 2008 Operating Agreement).

2. New Mexico contends (Br. in Opp. 15-21) that it has complied with its obligation under Article IV of the Compact to deliver water to Elephant Butte, and that the Compact does not require New Mexico to deliver any amount of water to the Texas state line. New Mexico thus contends that the Complaint does not allege a violation of any express term of the Compact; rather, New Mexico contends, Texas alleges at most that Texas water users are not receiving water that they have contracted with the United States to receive. *Ibid.* New Mexico notes that Article XII of the 1929 interim compact provided Texas with "explicit protections for the water supply of the Rio Grande in New Mexico below Elephant Butte" that were not carried forward into the 1938 Compact. *Id.* at 18-20; see 46 Stat. 772.

New Mexico further contends that there are alternative fora for resolution of the issues raised in Texas's complaint, Br. in Opp. 22-31, and that the Court should deny Texas leave to file its complaint because the United States is an indispensable party that has not consented to joinder, *id.* at 31-34.

3. Colorado takes no position on Texas's allegations and states that it cannot support Texas's motion until it better understands the alleged Compact violation at issue. Colo. Br. in Opp. 1-5.

DISCUSSION

The Court should grant Texas leave to file its complaint. Texas alleges an interstate dispute of sufficient importance to warrant this Court's exercise of its original jurisdiction, and there is no other forum in which the controversy practicably can be resolved. New Mexico's challenges to the complaint's legal sufficiency turn on the interpretation of the Compact and

thus should be resolved on their merits. At this threshold stage, Texas has adequately pled an injury to its sovereign rights under a reasonable interpretation of the Compact.

The United States additionally suggests that this Court provide a mechanism for the parties to address potentially dispositive legal issues. Resolution of those issues, which could be placed before the Court through a motion in the nature of a motion to dismiss, could significantly facilitate disposition of the controversy.

I. TEXAS'S COMPLAINT ALLEGES A CONTROVERSY THAT WARRANTS THE EXERCISE OF ORIGINAL JURISDICTION

This Court has original and exclusive jurisdiction over a case or controversy between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). That jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983); see, *e.g.*, *New Jersey* v. *New York*, 523 U.S. 767, 771-772 (1998); *Kansas* v. *Colorado*, 514 U.S. 673, 675 (1995); *Virginia* v. *West Virginia*, 206 U.S. 290, 317-319 (1907). The Court has determined that its exercise of original jurisdiction is "obligatory only in appropriate cases." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (citations omitted); see *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995); *Texas* v. *New Mexico*, 462 U.S. at 570. In deciding whether to grant leave to file a complaint in a dispute arising under its exclusive original jurisdiction, the Court examines "the nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (internal quotation

marks and citations omitted). The Court also considers "the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* Applying those standards, Texas's complaint presents a controversy warranting the exercise of original jurisdiction.

A. Texas's Claim Of A Breach Of The Interstate Water Compact Asserts A Substantial Sovereign Interest

1. In claiming that New Mexico is depriving Texas of its lawful share of the water of an interstate stream, Texas asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court's original jurisdiction. See, *e.g.*, *Montana* v. *Wyoming*, 131 S. Ct. 1765 (2011); *Texas* v. *New Mexico*, 462 U.S. at 567-568; *Arizona* v. *California*, 373 U.S. 546 (1963); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Wyoming* v. *Colorado*, 298 U.S. 573 (1936); *Kansas* v. *Colorado*, 185 U.S. 125 (1902). If Texas is correct that New Mexico violates the Compact by allowing New Mexico water users to use Rio Grande surface water, tributary flow, or return flows below Elephant Butte beyond what is authorized in the Compact—and if New Mexico users are thereby significantly intercepting or impairing the flow of Project water that Texas is entitled to receive under the Compact—such interference would be actionable. See *Texas* v. *New Mexico*, 482 U.S. 124, 129 (1987).

New Mexico suggests (Br. in Opp. 2, 11 n.10) that Texas's sovereign interests are not implicated by EPCWID's alleged failure to receive water because Texas itself does not have a contract with the United States for delivery of Project water. But as a sovereign State and a party to the Compact, Texas may defend its Compact apportionment, as this Court has long recognized in connection with water disputes.

See *Nebraska* v. *Wyoming*, 515 U.S. at 21-22. This Court has previously entertained an original action in which the apportionment and delivery of water in an interstate river were accomplished through Reclamation contracts with irrigation districts. See *Arizona* v. *California*, 373 U.S. at 580-585.

2. Furthermore, although the question whether Texas has properly invoked the Court's original jurisdiction is distinct from the question whether Texas will prevail on the merits, Texas's allegations of a Compact violation are credible.

a. Contrary to New Mexico's contention (Br. in Opp. 15-21), the equitable apportionment of the Rio Grande Basin did not end at Elephant Butte. The Compact states that it is intended to apportion the water of the Rio Grande from its headwaters in Colorado to Fort Quitman, Texas. Preamble, 53 Stat. 785. To accomplish that apportionment, the Compact requires Colorado to deliver a specific quantity of water to the New Mexico state line, and it requires New Mexico to deliver a specific quantity of water to Elephant Butte. Arts. III, IV, 53 Stat. 787-788. Once the water is delivered by New Mexico to Elephant Butte (*i.e.*, into "project storage," Art. I(k), 53 Stat. 786), it becomes "usable water" under the Compact, to be released by the Project "in accordance with irrigation demands, including delivery to Mexico." Art. I(*l*), 53 Stat. 786. Reclamation controls the releases for those uses described in Article I(*l*) pursuant to federal contracts and a treaty that were already in place when the Compact was signed.

Indeed, EBID and EPCWID agreed to freeze the historical proportions of irrigated acreage supplied by the Project downstream of Elephant Butte at 57% for

EBID and 43% for EPCWID on February 16, 1938—a month before the Compact was signed. App., *infra*, 1a-4a. Answering a letter from a lawyer for downstream Rio Grande interests who inquired why the Compact did not provide for a specific amount of water to be delivered to Texas, the Compact Commissioner for Texas explained that "the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation" in which "the total area is 'frozen' at the figure representing the acreage now in cultivation." Douglas R. Littlefield, *Conflict on the Rio Grande* 213-214 (2008) (quoting Letter from Frank B. Clayton to Sawnie Smith (Oct. 4, 1938)). This indicates Texas's understanding at the time the Compact was signed that its apportionment of Rio Grande water was defined by the existing contracts with the Project.

If New Mexico's only obligation under the Compact were to deliver water to Elephant Butte, and if New Mexico were then free to allow depletions of the Project water supply available below Elephant Butte, then Texas bargained for little under the Compact. That view of the Compact is inconsistent with its basic purpose, which is to equitably apportion the water of the Rio Grande Basin—from its headwaters to Fort Quitman—among the three compacting States.

New Mexico's view of the Compact is also inconsistent with the requirement that New Mexico "deliver" a specific quantity of water to Elephant Butte. See Art. IV, 53 Stat. 788. "Delivery" is generally understood to mean "[t]he formal act of transferring something" or "the giving or yielding possession or

control of something to another." See *Black's Law Dictionary* 494 (9th ed. 2009); see also *Black's Law Dictionary* 349 (2d ed. 1910) (current edition when Compact was negotiated and signed; defining "delivery" in the context of "conveyancing" as "[t]he final and absolute transfer of a deed * * * in such manner that it cannot be recalled by the grantor"); *Fox* v. *Young*, 91 S.W.2d 857, 859 (Tex. Civ. App. 1936) ("A delivery may be said to have been made whenever, at the time and place * * * the parties have agreed upon, the seller has done everything which is necessary to be done in order to put the goods completely and unconditionally at the disposal of the buyer."). When New Mexico "delivers" water to Elephant Butte under the Compact, it relinquishes control of the water to the Project. The *Project* then is to release the water "in accordance with irrigation demands" for Project beneficiaries—who receive the Project water supply, including return flows derived from the released water—and for "deliver[y] to Mexico." Art. I(*l*), 53 Stat. 786.

New Mexico's view of the Compact likewise is inconsistent with Reclamation law more generally, which provides that only entities having contracts with the United States may receive deliveries of water from a Reclamation project. See Omnibus Adjustment Act of May 25, 1926, ch. 383, §§ 45-46, 44 Stat. 648-650 (43 U.S.C. 423d, 423e); see also 43 U.S.C. 485h(c), (d) and (e); *Strawberry Water Users Ass'n* v. *United States*, 576 F.3d 1133, 1148 (10th Cir. 2009) (stating that project water "is not there for the taking (by the landowner subject to state law), but for the giving by the United States") (citing *Israel* v. *Morton*, 549 F.2d 128, 132-133 (9th Cir. 1977)). The require-

ment of a contract for project water includes seepage and return flows. See *Ide* v. *United States*, 263 U.S. 497, 505 (1924) (holding that a federal Reclamation project is entitled to seepage water for irrigation). Accordingly, once water is delivered by New Mexico, there is no apportionment of water under the Compact to New Mexico below Elephant Butte other than Project water delivered to EBID pursuant to a contract, and New Mexico may not allow the use of water downstream from Elephant Butte that intercepts or interferes with release and delivery of Project water. Because Texas water users are protected in this manner from unauthorized uses of water in New Mexico, it is irrelevant that New Mexico's promise in the interim Compact that it would not allow the water above or below Elephant Butte "to be impaired by new or increased diversion or storage within the limits of New Mexico," Art. XII, 46 Stat. 772, was not reiterated in those terms in the Compact.[2]

b. New Mexico contends (Br. in Opp. 12-13) that under Article XI of the Compact, a State may only request relief from this Court for a claim that one State has changed "the character or quality of the water, at the point of delivery, * * * to the injury of

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[2] In the past, New Mexico has taken inconsistent positions on the Compact's apportionment of water below Elephant Butte. See *City of El Paso* v. *Reynolds*, 563 F. Supp. 379, 382, 386 (D.N.M. 1983) (explaining that New Mexico argued that it could not allow the export of groundwater from southern New Mexico because the Compact "apportions the surface water of the Rio Grande between the states of New Mexico and Texas and controls the use of hydrologically related ground water," but stating that New Mexico had previously taken the position in *Texas* v. *New Mexico*, Original No. 9, that the Compact "does not apportion the Rio Grande between New Mexico and Texas").

another," 53 Stat. 790-791, and that Texas has not made such an allegation. That is incorrect.

Article XI provides that the Compact settles all controversies between New Mexico and Texas "relative to the quantity or quality of the water of the Rio Grande," and that "nothing [in the Compact] shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." 53 Stat. 790-791. That language does not prevent a State from seeking recourse in this Court on the ground that another State is failing to comply with its obligations under the Compact or is interfering with the complaining State's equitable apportionment.

Furthermore, the Compact does not define "character," but the disjunctive "or" in the phrase "character or quality" of water suggests that "character" refers to something other than water quality. The term could refer, for example, to the possessory status of the water, and New Mexico could be said to have changed the character of the water at the place of delivery by preventing the Project from controlling the water when it does so.

B. The Alternative Fora New Mexico Identifies Would Not Resolve The Parties' Dispute

New Mexico identifies two pending cases that it contends provide an adequate alternative forum to resolve Texas's claims. Neither case would provide Texas with the relief it seeks.

1. New Mexico first identifies (Br. in Opp. 24-27) *New Mexico* v. *United States*, No. 1:11-cv-691-JB-ACT (D.N.M.), as an alternative forum to resolve

Texas's claims. In that case, New Mexico and intervenor City of Las Cruces have sued the United States in federal district court seeking to void a settlement agreement (the 2008 Operating Agreement) among Reclamation, EBID, and EPCWID regarding the operation of the Project.

The 2008 Operating Agreement settled separate suits brought by EPCWID and EBID against Reclamation. EPCWID's suit alleged, *inter alia*, that EPCWID was not receiving its 43% of the Project's available water supply, and that Reclamation was failing to account for the adverse impact on Project deliveries caused by EBID's pumping of water in the Mesilla aquifer in New Mexico. *El Paso County Water Improvement Dist. No. 1* v. *Elephant Butte Irrigation Dist.*, 3:07-cv-00027-PRM Docket entry No. 2, paras. 14, 32 & p. 17 (W.D. Tex. Jan. 22, 2007).

Under the 2008 Operating Agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for return flows, from a given volume of water released from the Project based on 1951-1978 hydrological conditions. See U.S. Bureau of Reclamation, Dep't of the Interior, *Supplemental Environmental Assessment, Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas* 4-7, 12 (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/Final-SuppEA.pdf. After subtracting Mexico's share of the water, Reclamation assigns 43% of the available water to EPCWID. *Id.* at 13-14, 18. The effect of the Operating Agreement is that EBID agrees to forgo a portion of its Project deliveries to account for changes in

Project efficiency caused by groundwater pumping in New Mexico. *Id.* at 4.

New Mexico contends (Br. in Opp. 25) that if the federal court in New Mexico upholds the 2008 Operating Agreement, "any interest Texas might have in the delivery of water from the Project will be vindicated." That is incorrect. The 2008 Operating Agreement protects Project deliveries to EPCWID and Mexico based on 1951-1978 hydrological conditions. Texas asserts that it is entitled to 43% of Project water based on hydrological conditions existing when the Compact was signed in 1938. Compl. para. 18.

Furthermore, the 2008 Operating Agreement does not prohibit New Mexico from allowing or authorizing groundwater pumping. Accordingly, particularly under drought conditions, there would likely come a point when uncapped groundwater pumping in New Mexico would reduce Project efficiency to a point where 43 percent of the available water could not be delivered to Texas, even if EBID forwent *all* Project deliveries. New Mexico's pending federal court action therefore would not definitively resolve Texas's claims.

2. New Mexico also identifies *New Mexico ex rel. State Engineer* v. *Elephant Butte Irrigation District*, No. CV-96-888 (N.M. 3d Dist.), a general water adjudication in New Mexico state court, as an alternative forum. In that adjudication, a New Mexico state court is determining rights to water of the Rio Grande below Elephant Butte. The United States has filed a claim to water for the Project, including the right to deliver at the Texas state line an amount of water sufficient to satisfy Project needs in Texas and obligations to Mexico. United States' Statement of Claim

for Water for the Rio Grande Project, CV-96-888 Docket entry (N.M. 3d Dist. Sept. 15, 2010), https://lrgadjudication.nmcourts.gov/index.php/overview/doc_download/568-united-states-statement-of-claim-for-water-for-teh-rio-grande-project.pdf.

New Mexico has taken the position in that general adjudication that the water right decreed for the Project may not recognize the United States' obligation to deliver water to EPCWID. N.M. Resp. in Opp. to the U.S. Mot. for Summ. J. 29 (May 24, 2013) (disputing that "in adjudicating water rights in New Mexico, the Court should grant the United States a water right for waters appropriated and used in Texas"), https://lrgadjudication.nmcourts.gov/index.php/overview/doc_download/566-state-of-new-mexico-s-response-in-opposition-to-the-united-states-motion-for-summary-judgment.pdf. If, as New Mexico contends, only intrastate water rights will be considered in the state adjudication, then the water adjudication cannot resolve the issue of Compact interpretation that Texas raises in its complaint.

Furthermore, Texas's Compact apportionment must be respected by New Mexico regardless of the claims of its water users to Rio Grande water under New Mexico law. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (apportionment of water in an interstate stream pursuant to a compact "is binding upon the citizens of each State and all water claimants"). The parties disagree about what amount of water, if any, is apportioned to Texas under the Compact. Although New Mexico apparently is of the view that Texas compacted for an apportionment of water that is subject to whatever limitations New Mexico law may place on

the Project's water right, that is a question for this Court, and not a New Mexico state court, to decide. See *West Virginia, ex rel. Dyer* v. *Sims*, 341 U.S. 22, 28 (1951) ("A State cannot be its own ultimate judge in a controversy with a sister State.").

C. Denying Texas Leave To File A Complaint Based On The Status Of The United States Would Be Premature

It would be premature at this stage to reject Texas's complaint based on the United States' possible status as a required party. Cf. Fed. R. Civ. P. 19; see, *e.g.*, *Idaho ex rel. Andrus* v. *Oregon*, 429 U.S. 163, 164 (1976) (per curiam) (granting motion to file complaint and leaving open the question of indispensability of the United States, to be resolved "in the event the United States does not enter its appearance"). While the United States may, in fact, be determined to be a required party, the Court should not deny Texas leave to file its complaint on that basis at this juncture, if for no other reason than the United States may elect to intervene if the case goes forward.

II. BEFORE REFERRING THE MATTER TO A SPECIAL MASTER, THIS COURT SHOULD PROVIDE FOR RESOLUTION OF THRESHOLD LEGAL ISSUES

Upon granting leave to file a complaint, the Court typically directs the defendant to file an answer and then refers the matter to a Special Master to conduct appropriate proceedings. See, *e.g.*, *New Jersey* v. *New York*, 511 U.S. 1080 and 513 U.S. 924 (1994); *Nebraska* v. *Wyoming*, 479 U.S. 1051 (1987). In certain situations, however, this Court has resolved preliminary or potentially controlling legal issues before, or in lieu of, referring the case to a Special Master. See *New Hampshire* v. *Maine*, 530 U.S. 1272 (2000);

United States v. *Alaska*, 499 U.S. 946 (1991); 501 U.S. 1275 (1991); 503 U.S. 569 (1992); *Wyoming* v. *Oklahoma*, 488 U.S. 921 (1988); *United States* v. *California*, 375 U.S. 927 (1963); *United States* v. *Louisiana*, 338 U.S. 806 (1949). This case is one in which the latter course might be followed.

Texas and New Mexico disagree over whether the Compact permits New Mexico to allow water users to intercept surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte, beyond what is authorized under the Project. If this action were governed by the Federal Rules of Civil Procedure, New Mexico would be entitled to test its theory by moving to dismiss Texas's complaint for failure to state a claim on which relief may be granted. See Fed. R. Civ. P. 12(b)(6). Although the Federal Rules are not strictly applicable here, they provide a guide to the Court's proceedings. See Sup. Ct. R. 17.2. The Court may wish to apply the procedure suggested by Rule 12(b)(6) to facilitate the disposition of this action. See, *e.g.*, *Kansas* v. *Nebraska*, 527 U.S. 1020 (1999).

Because the Court uses the Federal Rules of Civil Procedure as merely a guide to the conduct of original actions, it may tailor appropriate procedures to facilitate its decision-making process. See *United States* v. *Alaska*, 501 U.S. 1248 (1991); 501 U.S. 1275. The United States suggests that the Court may wish to grant Texas leave to file its complaint and simultaneously grant New Mexico leave to file a motion, in the nature of a motion under Rule 12(b)(6), with respect to the issues of compact interpretation that New Mexico deems dispositive. If the Court follows that recommendation, the United States suggests that the Court

may wish to set a schedule for the motion and supporting brief, opposition, and reply. The Court would retain the option of referring the motion to dismiss to a Special Master in the first instance once briefing is completed, if that course seemed advisable at that time. See *Montana* v. *Wyoming*, 129 S. Ct. 480 (2008); 552 U.S. 1175 (2008).

CONCLUSION

Texas should be granted leave to file its complaint. New Mexico should be invited to file a motion in the nature of a motion to dismiss the complaint.

Respectfully submitted.

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DECEMBER 2013

COPY 2-16-38

CONTRACT

This contract made and entered into by and between the Elephant Butte Irrigation District of New Mexico and El Paso County Water Improvement District No. 1 of Texas, pursuant to resolutions of the Board of Directors of the respective Districts, authorizing the same, WITNESSETH THAT:

WHEREAS, it is expedient that the acreage within each irrigation District which is to be irrigated should be cushioned by allowing the distribution of water to a small excess of acreage over and above that allotted to the two Districts under the Rio Grande New Mexico-Texas Reclamation Project, to the end that annual variations, within narrow limits, shall be permitted, and so that, each year, there will be within the Elephant Butte Irrigation District 88,000 acres of land, and within El Paso County Water Improvement District No. 1, 67,000 acres upon which construction and operation and maintenance charges may be levied;

THEREFORE, it is mutually agreed that either District may increase the acreage to be irrigated and to be subject to construction charges, not to exceed three (3%) per cent of the present authorized acreage in each District, that is to say, Elephant Butte Irrigation District, having authorized acreage of 88,000 acres, may increase such acreage to the extent of three (3%) per cent thereof, amounting to not to exceed 2,640 acres; that El Paso County Water Improvement District No. 1, having a present authorized acreage of 67,000

acres, may increase such acreage to three (3%) per cent thereof, that is, not to exceed 2,010 acres, said additional lands, in any case, to be within the limits of the present irrigation Districts or any future extensions thereof.

It is further agreed and understood that in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within El Paso County Water Improvement District No. 1, and 88/155 to the lands within the Elephant Butte Irrigation District.

It is further agreed and understood that the operation and maintenance costs of the project works (exclusive of the storage and power development) for the calendar year of 1938 and thereafter shall be distributed between the two Districts in the same manner as similar costs were distributed for the calendar year 1937, and that the same ratios for the two Districts, respectively, that were applied to said costs for that year common to both Districts shall be used in 1938 and subsequent years.

This contract to be effective only during the period when the proposed contracts under Public No. 249, Seventy-fifth Congress, 1st Session, between, (1) the United States and Elephant Butte Irrigation District and (2) the United States and El Paso County Water Improvement District No. 1 are in force, and if either or both of said contracts should terminate after both have become effective, this contract is also to terminate.

IN TESTIMONY WHEREOF, the parties hereunto have caused the same to be signed by the Presidents of their respective Boards of Directors, and attested by the Secretary with the seal of said corporation, this 16th day of February A.D. 1938.

THE ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO.

By (Signed) Arthur Starr
President

(SEAL)

ATTEST: (Signed) Jose R. Lucero
Secretary, Elephant Butte
Irrigation District.

EL PASO COUNTRY WATER IMPROVEMENT DISTRICT DISTRICT NO. 1 OF TEXAS

By (Signed) T.D. Porcher
President

(SEAL)

ATTEST: (Signed) Idus T. Gillett
Secretary, El Paso County Water
Improvement District No. 1.

APPROVED THIS 11TH DAY OF APR., A.D. 1938

(Signed) Oscar L. Chapman
ASSISTANT SECRETARY
OF THE INTERIOR